IN THE OFFICE OF THE SECRETARY OF EDUCATION
COMMONWEALTH OF PENNSYLVANIA

JOSEPH MOFFITT,	:	
Appellant	:	
	:	
v.	:	**Teacher Tenure Appeal**
	:	**No. 03-16**
	:	
TUNKHANNOCK AREA SCHOOL	:	
DISTRICT,	:	
Appellee	:	

OPINION AND ORDER

Joseph Moffitt (Appellant) appeals to the Secretary of Education (Secretary) from the decision of the Tunkhannock Area School District (District) Board of Education (Board) dismissing him from his position as Principal of the Evans Falls and Mills City Elementary Schools under Section 1122 of the Public School Code.

Findings of Fact

1. In June 2010, Appellant was arrested for the crime of Driving Under the Influence of Alcohol (DUI). Tr.[1] 6/9/16 at 140. On or about January 12, 2011, Appellant's crime was resolved via entry into an Accelerated Rehabilitative Disposition Program (ARD) in Wyoming County. Employer Exhibit 1; *Id.*

2. In April 2014, Appellant was arrested a second time for DUI. On or about October 26, 2015, Appellant pled guilty to the second DUI offense in Wyoming County. Employer Exhibit 2; Tr. 6/9/16 at 140. When he committed these two DUI offenses, Appellant

[1] "Tr." generally refers to the transcripts of the proceedings that occurred in this matter with specific references as follows:
"Tr. 5/26/16" refers to the transcript of the proceedings which occurred on May 26, 2016.
"Tr. 6/9/16" refers to the transcript of the proceedings which occurred on June 9, 2016.
"Tr. 7/6/16" refers to the transcript of the proceedings which occurred on July 6, 2016.
"Tr. 12/16/16" refers to the transcript of the proceedings which occurred on December 16, 2016.

was the Principal of two District schools: the Evans Falls Elementary School and the Mills City Elementary School. Tr. 6/9/16 at 140. The schools are located at a distance of approximately seven miles from each other. Tr. 6/9/16 at 56.

3. Appellant's second DUI offense was reported in local newspapers including the *Wyoming County Examiner* and the *Scranton Times-Tribune.* District Exhibit 3.

4. At the time of his second DUI offense, Appellant had been a Principal and a tenured, professional employee for approximately 12 years. Tr. 6/9/16 at 140.

5. As Principal of two District schools at the same time, Appellant had to be able to travel between two schools which were not within walking distance of one another. Attempting to schedule such transportation in advance was not always feasible. Tr. 7/9/16 at 3-5, 8-15.

6. As a result of his driver's license suspension, Appellant could not perform his job duties without the ability to legally drive himself to either school on an unscheduled basis. *Id;* Tr. 6/9/16 at 56.

7. Beginning on February 29, 2016, following his conviction for a second DUI, Appellant's driver's license was suspended for a minimum of 12 months. Tr. 6/9/16 at 147-148, 154.

8. In addition to the suspension of his driver's license, Appellant received penalties stemming from his second DUI, which included but were not limited to 90 days house arrest subject to electronic monitoring, fines, and probation for a maximum term of five years beginning on January 13, 2016. Employer Exhibit 2.

9. On or about February 11, 2016, the District afforded Appellant a pre-disciplinary hearing; essentially an interview with Acting District Superintendent at that time, Frank Galicki.

10. Appellant and his legal counsel were present at the pre-disciplinary hearing. Tr. 6/9/16 at 46; Appellant's Reply Brief at 1.

11. By letter dated March 11, 2016, the Board (a) notified Appellant that the District had recommended his dismissal from employment, (b) provided him a written statement of the charges which served as the basis of the recommended dismissal, and (c) advised him that an evidentiary hearing would be held to determine whether he would be dismissed. *See* Board Exhibit 1, *Notice of Dismissal Charges*.

12. The evidentiary hearings before the Board were held on May 26 and June 9, 2016. Additional testimony in the matter before the Board was taken via depositions which took place on July 6, 2016. *See* Tr. 5/26/16, Tr. 6/9/16 and Tr. 7/6/16.

13. By letter dated September 12, 2016, the Board notified Appellant that it voted at its September 8, 2016 public meeting to dismiss him from employment with the District. *See* Notice of Board Decision.

14. By letter dated September 27, 2016, the Board's hearing officer forwarded an Adjudication to Appellant which provided the factual analysis, discussion of legal issues, and reasons for the Board's decision to terminate Appellant's employment. *See* Board Adjudication.

15. On or about October 11, 2016, Appellant appealed the Board's Adjudication to the Secretary and a hearing was held thereafter before a Hearing Officer appointed by the Secretary. *See* Petition for Appeal*;* Tr. 12/16/16.

Discussion

I. Appellant's due process rights were not violated.

In the present appeal, Appellant argues that his due process rights were violated and the District's procedures were not in accord with the United States Supreme Court decision in

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985). *See* Appellant's Brief at 24. I disagree. The pre-disciplinary process in the present matter provided Appellant constitutionally adequate notice of his alleged misconduct, an explanation of the District's evidence in support of that misconduct, and an opportunity to present his side of the story. *See Schmidt*, 639 F.3d at 596 (quoting *Loudermill*, 470 U.S. at 545). Notice need only contain enough specificity to make the nature of the employee's conduct clear. *Id.* at 599-600.

Consistent with *Loudermill* and its progeny, the pre-termination proceedings in the present matter served as an adequate "check" against erroneous decision-making and allowed the District to ensure that it had reasonable grounds for discipline. For purposes of constitutional due process, advance notice was not required. To the contrary, the Third Circuit has opined that notice is sufficient if it "apprises the individual of the substance of the matter at hand and permits adequate time to present any counter information and response." *McDaniels v. Flick*, 59 F.3d 446, 454-57 (3d Cir. 1995). *See also, Gniotek v. City of Phila*., 808 F.2d 241, 244 (3d Cir. 1986) (notice was sufficient where it was of "such specificity to allow [employee] the opportunity to determine what facts, if any, within his knowledge might be presented in mitigation of or in denial of the charges"). *See also, Copeland v. Phila. Police Dep't*, 840 F.2d 1139 (3d Cir. 1988) (holding that employee's due process rights were not violated even if the employer "did not prepare the formal, written charges against [him] until after he had been dismissed"). In *Copeland*, the Third Circuit held that due process was met where the employer advised the employee that he tested positive for illegal drugs, allowed him to respond, and then advised him that he was suspended with intent to dismiss, all in the course of a single interview. *Id.* The pre-disciplinary process afforded to Appellant was similar to that afforded to the employee in *Copeland.* In both instances, the employer acted appropriately under the circumstances.

In the present matter, there is no reason for me to conclude Appellant was unaware that he was being disciplined for his two DUI offenses at the time he attended the initial pre-disciplinary conference before the Acting Superintendent. In my opinion, this conference constituted a valid *Loudermill* hearing. Appellant was allowed to respond to the charges against him, which were in no way complex or confusing, at the initial conference at which he and his attorney were present. It is undisputed that Appellant was disciplined only after he was given a chance to present his own side of the story after being verbally advised of the charges against him. The law does not support Appellant's claim that he was entitled to receive written charges or every single piece of evidence against him at an initial conference before the Acting Superintendent for that conference to be valid under *Loudermill.* Accordingly, I conclude that, as a matter of law, the pre-deprivation process that the District afforded Appellant was constitutionally adequate.

II. The District did not violate the Americans with Disabilities Act (ADA) or otherwise unlawfully discriminate or retaliate against Appellant.

Appellant also argues that the District disciplined him in contravention of the ADA in removing him from employment and retaliated against him for initiating litigation against the District. *See* Appellant's Brief at 27-30. These arguments have no basis in fact or law. While it is undisputed that Appellant is an alcoholic, there is no reason to conclude that the District terminated his employment due to his alcoholism or a physical or mental impairment of any kind. To the contrary, Appellant was dismissed because he committed two DUI offenses within a five year period which rendered him unable to drive, which he may need to do for his job as Principal of elementary schools located at a distance of several miles from one another. Termination on these grounds does not violate the ADA.

It is beyond question that an employer may discipline an individual with a disability for misconduct that resulted from a disability as long as the misconduct is job-related for the position in question and is consistent with business necessity. *Wolski v. City of Erie*, 773 F. Supp. 2d 577, 590 (W.D. Pa. 2011). Courts have made clear that, although the ADA prevents an employer from discharging an employee based on his disability, it does not prevent an employer from discharging an employee for misconduct, even if that misconduct is related to a disability. *Sever v. Henderson*, 381 F. Supp. 2d 405 (M.D. Pa. 2005); *see also, Brown v. Lucky Stores, Inc.*, 246 F.3d 1182 (9th Cir. 2001); *Pernice v. City of Chicago*, 237 F.3d 783, 785 (7th Cir. 2001); *Jones v. American Postal Workers Union*, 192 F.3d 417, 429 (4th Cir. 1999). In the present matter, there is no basis to conclude that Appellant was terminated because he is an individual with a disability. It is clear that Appellant would have been terminated regardless of whether he is an alcoholic.

I find that Appellant was terminated for nothing other than job-related misconduct. I find unreasonable Appellant's proposal to rely on a teacher, relative, or friend to drive him between the two schools where he served as Principal should the need arise. I further find irrelevant the issue raised by Appellant that having a driver's license is not a written requirement of his job. Appellant's Brief at 22-23. The Appellant's ability to legally drive himself between the two schools is related to his employment and was properly considered by the District in its determination regarding whether to terminate Appellant's employment.

Accordingly, I reject Appellant's argument that the District discriminated against him due to his alcoholism or retaliated against him in any way. The Appellant was not terminated because he is an alcoholic nor was he terminated for any other non-merit factor (such as the fact that he has engaged the District in litigation). To the contrary, Appellant was terminated

exclusively for repeat DUI offenses, as a result of which he could not perform his job responsibilities.

III. Whether (and to what extent) Appellant received discipline pursuant to a certification proceeding under the Educator Discipline Act before the Professional Standards and Practices Commission has no bearing on whether grounds for his termination from employment exist.

I take official notice of the fact that Appellant has been publicly reprimanded due to the conduct at issue in this appeal in a certification matter adjudicated by the Commonwealth's Professional Standards and Practices Commission (PSPC) pursuant to the Educator Discipline Act.[2] Appellant argues that, because he was simply reprimanded by the PSPC in that proceeding and his certifications were not revoked, the District is prohibited from terminating his employment. *See* Appellee's Brief at 13. Appellant is incorrect. The law contains no such prohibition.

Appellant erroneously equates the PSPC matter regarding Appellant's certification with the action at issue here regarding Appellant's employment. PSPC's website cautions against doing exactly what Appellant had done here by making clear that PSPC-issued discipline is "discipline the taken by the [PSPC] against an educator's certification . . . [PSPC-issued] discipline should be distinguished from local discipline or employment action. Imposition of either local or state action for misconduct is not contingent on the other."[3]

Appellant's arguments fail to draw the necessary distinctions between the two disciplinary processes. With regard to the PSPC-issued public reprimand in Appellant's certification action, Appellant claims: "As the Appellees considered the same offenses and the

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[2] http://www.education.pa.gov/Teachers%20-%20Administrators/Certifications/Pages/Certificate-Actions-Search.aspx?searchTerm=Moffitt#tab-1

[3] http://www.pspc.education.pa.gov/Educator-Discipline-System-and-Reporting/FAQs/Pages/default.aspx

same school code provisions, the Appellees' decision to terminate Appellant directly contradicts" the decision in Appellant's certification matter before PSPC. Appellant's Brief at 12. Appellant is mistaken. Different School Code sections are applicable to certification actions filed with the PSPC than those applicable to employment actions initiated by a school district. (*Compare* Section 1122 of the School Code applicable to the present matter with Section 1255 (24 P.S. § 12-1255, *renumbered* at 24 P.S. § 2070.5) governing certification matters filed with the PSPC). The PSPC's process is not relevant here regarding whether the District has established grounds for a termination action. That process certainly does not bar the District from removing the Appellant from employment due to the job-related misconduct at issue.

The present matter is decided based exclusively upon the record before me at the present time—not on the record before the PSPC in a certification matter. Due to the fact that the certification action before the PSPC involve different record evidence as well as different legal standards, legal definitions and case law interpreting the different School Code Sections applicable to the separate causes of action, any attempt to conflate the present matter with the prior certification matter should be rejected.[4]

IV. The District has established grounds for termination by a preponderance of the evidence.

A tenured professional employee, such as Appellant, may only be dismissed for the reasons set forth in Section 1122 of the Public School Code. *Foderaro v. Sch. Dist. of Philadelphia,* 531 A.2d 570, 571 (Pa. Cmwlth. 1987). Section 1122 of the School Code provides in pertinent part:

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[4] PSPC has defined in regulations the terms set forth in the Educator Discipline Act which describe the conduct that may result in PSPC issued discipline in a certification matter (e.g., immorality). *See* 22 Pa. Code §§ 237.1-.9. Importantly, Commonwealth Court has opined that these definitions are not applicable to the conduct set forth in Section 1122 of the Public School Code of 1949, applicable to employment actions such as the matter now *sub judice*. *See* ***Seltzer v. Dep't of Educ.***, 782 A.2d 48, 52 (Pa. Cmwlth. 2001).

> [t]he only valid causes for termination of a contract heretofore or hereafter entered into with a professional employee shall be immorality; incompetency…; intemperance; cruelty; persistent negligence in the performance of duties; willful neglect of duties…persistent and willful violation of or failure to comply with school laws of this Commonwealth (including official directives and established policy of the board of directors); on the part of the professional employe[.]
>
> 24 P.S. §11-1122.

Pursuant to Section 1122 of the School Code, Appellant was charged with immorality due to his two, recent DUI offenses, which occurred in 2010 and 2014, respectively. Immorality is defined as "a course of conduct that offends the morals of a community and is a bad example to the youth whose ideals a professional educator is supposed to foster and elevate." *Horosko v. Sch. Dist. of Mount Pleasant Township,* 6 A.2d 866, 868 (Pa. 1939). Courts have established that the involved school district bears the burden of establishing the following criteria in employment matters alleging immorality: (1) the conduct actually occurred; (2) the conduct offends the morals of the community; and (3) the conduct is a bad example to the youth whose ideals the educator is supposed to foster and elevate. *Kinniry v. Abington Sch. Dist.*, 673 A.2d 429, 432 (Pa. Cmwlth.1996).

In the present matter, it is undisputed that Appellant engaged in conduct resulting in two recent DUI offenses approximately four years apart while he was employed as the Principal of two District elementary schools. It is further undisputed that, Appellant's DUIs rendered him unable to legally drive between the two schools (located multiple miles apart) where he served as Principal. At the time of the hearing before the Secretary's Hearing Officer, Appellant's license was suspended and he was serving a multi-year term of probation in Susquehanna County. *See* District Exhibit 2, Tr. 12/16/16 at 8-9. In addition, the following witnesses provided unrebutted testimony and evidence on behalf of the District to support the conclusions that Appellant's two

recent DUI offenses, which were committed within a relatively short time of one another, offended the morals of the community, and set a bad example to the youth whose ideals he was supposed to foster and elevate: (1) Former Acting Superintendent Frank Galicki, Tr. 6/9/16 at 53-54; (2) Assistant Superintendent Mary Gene Eagen, Tr. 6/9/16 at 77-79; (3) District Superintendent Heather McPherson, Tr. 6/9/16 at 77-79; (4) Elementary Teacher for the District Joanne Yanchick, Tr. 6/9/16 at 87, Employer Exhibit 4; (5) Katherine Felker, Director of a Cyber Academy and Educational Services Program for the District, Tr. 6/9/16 at 87; (6) Justin Yadlosky, District resident and parent of a District students, Tr. 6/9/16 at 124-127; (7) Susan Bugno, District Principal, Tr. 7/6/16 at 6; (8) Renelle Theodore, District parent and community resident, Employer Exhibit 5. All of these witnesses presented similar evidence that Appellant's conduct was offensive and a bad example to youth in the community where they lived and/or worked. I find the evidence presented by these witnesses to be credible. I reject the notion advanced by Appellant that none of these eight community members are to be believed. *See* Appellant's Brief at 20.

In contrast, Appellant presented no competent, credible evidence to rebut the District's presentation, notwithstanding the fact that he had numerous opportunities to do so. The proceedings in the present matter occurred over the course of several days and Appellant was given the opportunity to present evidence on each day. Appellant elected not to call any witnesses to contradict the District's presentation. Therefore, I am constrained by the evidence to find in favor of the District. Based upon the undisputed testimony and documentary evidence provided by the above-listed witnesses who lived and/or worked in the Tunkhannock School District community, I find that the District has proven by a preponderance of the evidence that it

was justified in removing Appellant from employment. Accordingly, I affirm the District's dismissal action.

Notwithstanding my concurrence with the District regarding the outcome in the present matter and several of its arguments, I must note my disagreement with the District on a few important points. First, I disagree with the District that this matter presents a *per se* justification for dismissal in all cases involving the same or similar misconduct. A "one-size fits all" ruling is unwarranted here. Each case must be evaluated on its own merits with the evidence carefully weighed in each instance. I decline the District's invitation to conclude that the Commonwealth Court's holding in *Zelno v. Lincoln Intermediate Unit No. 12 Bd. of Dirs.*, 786 A.2d 1022 (Pa. Cmwlth 2001) is binding in the present matter. *See* Appellee's Brief at 10. In *Zelno*, the educator's misconduct "resulted in three drunken driving convictions and two more for driving without a license" *Id.* at 1026. *Zelno* is distinguishable from the present matter is that the five criminal convictions in that case constitute more egregious misconduct than the matter now at hand. Accordingly, I am not bound in any way by *Zelno*. I view the appeal before me now as a matter of first impression.

Second, I also would not conclude, as former Acting Superintendent Galicki would, that Appellant's misconduct has irreparably harmed his reputation. Appellee's Brief at 6. To the contrary, I am a firm believer in the ability of individuals to become successfully rehabilitated after committing offenses such as those at issue here. I encourage Appellant to continue to seek help for his admitted alcoholism.

Finally, one also should not misconstrue this Adjudication as permanently barring Appellant from employment. Appellant's educator certifications currently are valid. Accordingly, if Appellant provides any prospective employer with evidence which, in the

opinion of that employer, establishes that he has been rehabilitated and has led a law abiding life, other than the two offenses at issue here, nothing in the record before me prohibits his employment. In the present matter, I simply hold that the District's dismissal action must be upheld where, as here, Appellant has presented no credible evidence to rebut evidence presented by the District that supports a conclusion that this dismissal was justified. Accordingly, the following order is entered:

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COMMONWEALTH OF PENNSYLVANIA

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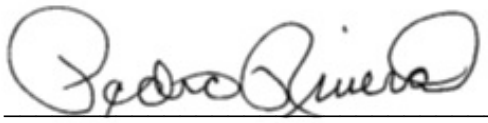
Appellant	:	
	:	
v.	:	**Teacher Tenure Appeal**
	:	**No. 03-16**
	:	
TUNKHANNOCK AREA SCHOOL DISTRICT,	:	
Appellee	:	

ORDER

AND NOW, this 9th day of May, 2017, it is hereby ordered and decreed that Joseph Moffitt's appeal is denied, and the decision of the Tunkhannock Area School District terminating his employment is affirmed.



Pedro A. Rivera
Secretary of Education

Date Mailed: May 9, 2017